REMARKS

Claims 26-43, 45-49 were pending. Applicant has herein cancelled claims 35-43 without prejudice to continued prosecution in a continuation application. Accordingly, claims 26-34 and 45-49 are pending.

Applicant thanks the Examiner for the courtesy of the telephonic interview on March 2, 2006, the contents of which are incorporated in the remarks set forth below.

In light of the remarks set forth below, Applicant respectfully requests reconsideration and allowance of claims 26-34 and 45-49.

Rejections under 35 U.S.C. § 102(e)

The Examiner rejected claims 35-37 and 39-43 under 35 U.S.C. § 102(e) as being anticipated by Baron (U.S. Pat. No. 6,482,451) ("Baron"). Applicant has herein cancelled claims 35-43, thereby rendering the rejection moot. Applicant respectfully requests withdrawal of the rejections.

Rejections under 35 U.S.C. § 103(a)

The Examiner rejected claim 38 and claims 26-34 and 45-49 under 35 U.S.C. § 103(a) as unpatentable over Baron. As noted previously, Applicant has cancelled claim 38, thereby rendering this rejection moot.

With respect to claims 26-34 and 45-49, the Examiner also rejected the claims as unpatentable over Baron, stating that Baron shows a kit for making a product with at least one additive packaged separately from the product. The Examiner acknowledged that Baron does not teach a dietary supplement product. The Examiner took "official notice" that it was notoriously old and well known in the art to provide a dietary supplement product, stating that it was well known to provide a milk fortified with additional vitamins, and that it would have been obvious to one of ordinary skill in the art to modify the apparatus of Baron by providing a dietary supplement in order to provide a healthier product. The Examiner also stated that although Baron did not teach a container having a plurality of servings nor providing a plurality of

individually packaged additives, he took "official notice" that it was notoriously old in the art to do so.

The Examiner also rejected claims 26-28, 30-32, and 45-49 under 35 U.S.C. § 103(a) as being unpatentable over Lloyd *et al.* (US 2002/0110622) ("Lloyd"). The Examiner stated that Lloyd shows a kit for making a product and at least one additive packaged separately from the product. The Examiner acknowledged that Lloyd did not teach a dietary supplement product. As with Baron, the Examiner took official notice that it was notoriously old in the art to do so.

Applicant respectfully disagrees. Present claim 26 recites a kit for making a nutritional supplement comprising a dietary supplement product and at least one additive, where the additive is packaged separately from the dietary supplement product. At no time does Baron or Lloyd, either separately or in combination, teach such a kit. Both Baron and Lloyd teach apparatuses useful for the consumption of conventional foods (e.g., milk, such as vitamin-fortified milk, and cereal), rather than "dietary supplements," as required in the pending claims. As discussed in the telephonic interview, Applicant respectfully points out to the Examiner that the term "dietary supplement" is a term of art having a defined meaning; one having ordinary skill in the art would have understood, from a time well before the date of the present filing, that the term "dietary supplement" means products that are intended to supplement the diet and that are not represented for use as a conventional food or staple of the diet. Indeed, in the United States, a dietary supplement is defined under the Dietary Supplement Health and Education Act of 1994 as a product that meets each of the following criteria:

1. It is intended to supplement the diet and bears or contains one or more of the following dietary ingredients: a vitamin, a mineral, an herb or other botanical (excluding tobacco), an amino acid, a dietary substance for use by man to supplement the diet by increasing the total daily intake (e.g., enzymes or tissues from organs or glands), a concentrate, such as a meal replacement or energy bar, or a metabolite, constituent, or extract.
2. It is intended for ingestion in pill, capsule, tablet, or liquid form.
3. It is not represented for use as a conventional food or as the sole item of a meal or diet.

4. It is labeled as a "dietary supplement".[1]

Thus, as can be seen from the above, the term "dietary supplement" has had a defined meaning since 1994 to one having ordinary skill in the art. In further support, Applicant refers the Examiner to page 4, line 7 of the present specification, where dietary supplement bases "such as a muscle building or protein powder" are described, dietary supplement bases that are consistent with the above definition and that are clearly not conventional foods. Applicant respectfully asserts that one having ordinary skill in the art would therefore understand milk, even vitamin-fortified milk, to be a conventional food, indeed a staple of the diet as part of the food pyramid, and not a "dietary supplement." Moreover, the guidelines would require vitamin-fortified milk to be labeled as a "dietary supplement" if it were considered such by those having ordinary skill in the art, which it is not.

Proper analysis under § 103 requires consideration of two factors: (1) whether the prior art would have suggested to those of ordinary skill in the art that they should make the claimed composition, and (2) whether the prior art would also have revealed that in so making, those of ordinary skill would have had a reasonable expectation of success. In re Vaeck, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991). As indicated above, Applicant respectfully asserts that neither Baron nor Lloyd teach "dietary supplements." In contrast to the Examiner's assertions, even vitamin-fortified milk would not be considered a "dietary supplement" to one having ordinary skill in the art. Moreover, at no point does either Baron or Lloyd suggest modifying his respective apparatus to provide a dietary supplement; there is simply no motivation to do so based on the references, either alone or in combination. The mere fact that dietary supplement products exist and can be "provided" is not a sufficient basis for the Examiner to assert a motivation to modify the apparatuses of Baron or Lloyd to substitute a nutritional supplement for a conventional food item. The Baron and Lloyd apparatuses clearly are directed to providing convenience mechanisms for the ingestion of conventional food items. They provide no

[1] Applicant attaches hereto a copy of a summary of the Dietary Supplement Health and Education Act of 1994, downloaded from the FDA web-site, and a copy of the definition of "dietary supplement" available from wikipedia.com.

suggestion that the conventional food products provided therein should be replaced with dietary supplements. Applicant respectfully requests reconsideration and withdrawal of the rejections.

CONCLUSION

Applicant respectfully asserts that all claims are in condition for allowance, which action is respectfully requested. The Examiner is invited to telephone the under-signed attorney if such would expedite prosecution.

No fees are believed due. Please apply any other charges or credits to deposit account 06-1050.

Respectfully submitted,

Date: 3/6/06

Teresa A. Lavoie, Ph.D.
Reg. No. 42,782

Fish & Richardson P.C., P.A.
60 South Sixth Street
Suite 3300
Minneapolis, MN 55402
Telephone: (612) 335-5070
Facsimile: (612) 288-9696

60343964.doc